

**FEDERAL RESERVE SYSTEM**

**12 CFR Part \_\_\_\_**

**Regulation \_\_\_\_; Docket No. R-1479**

**RIN 7100 AE-10**

**Complementary Activities, Merchant Banking Activities, and Other Activities of Financial Holding Companies related to Physical Commodities**

**AGENCY:** Board of Governors of the Federal Reserve System.

**ACTION:** Advance notice of proposed rulemaking.

**SUMMARY:** The Board of Governors of the Federal Reserve System (Board) is issuing this advance notice of proposed rulemaking (ANPR) inviting public comment on various issues related to physical commodity activities conducted by financial holding companies and the restrictions imposed on these activities to ensure they are conducted in a safe and sound manner and consistent with applicable law. The activities under review include physical commodities activities that have been found to be “complementary to a financial activity” under section 4(k)(1)(B) of the Bank Holding Company Act (BHC Act), investment activity under section 4(k)(4)(H) of the BHC Act, and physical commodity activities grandfathered under section 4(o) of the BHC Act. The Board is inviting public comment as part of a review of these activities for the reasons explained in the ANPR, including the unique and significant risks that physical commodities activities may pose to financial holding companies, their insured depository institution affiliates, and U.S. financial stability.

**DATES:** Comments must be received no later than March 15, 2014.

**ADDRESS:** You may submit comments, identified by Docket No. 1479 AND

RIN 7100 AE-10 by any of the following methods:

- Agency Web Site: [http:// www.federalreserve.gov](http://www.federalreserve.gov). Follow the instructions for submitting comments at <http://www.federalreserve.gov/apps/foia/proposedregs.aspx>.
- Federal eRulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.
- E-mail: [regs.comments@federalreserve.gov](mailto:regs.comments@federalreserve.gov). Include the docket number and RIN number in the subject line of the message.
- Fax: (202) 452–3819 or (202) 452– 3102.
- Mail: Address to Robert deV. Frierson, Secretary, Board of Governors of the Federal Reserve System, 20th Street and Constitution Avenue, NW., Washington, DC 20551.

All public comments will be made available on the Board's Web site at <http://www.federalreserve.gov/apps/foia/proposedregs.aspx> as submitted, unless modified for technical reasons. Accordingly, comments will not be edited to remove any identifying or contact information. Public comments may also be viewed electronically or in paper in Room MP- 500 of the Board's Martin Building (20<sup>th</sup> and C Streets, NW.) between 9 a.m. and 5 p.m. on weekdays.

#### **FOR FURTHER INFORMATION CONTACT:**

Laurie Schaffer, Associate General Counsel, (202) 452-2272, Michael Waldron, Special Counsel, (202) 452-2798; Benjamin McDonough, Senior Counsel, (202) 452-2036, April Snyder, Senior Counsel, (202) 452-3099, or Will Giles, Counsel, (202) 452-3351, Legal Division; or Mark Van Der Weide, Deputy Director, (202) 452-2263, Timothy Clark, Senior Associate Director, (202) 452-5264, Todd Vermilyea, Senior Associate Director, (202) 912-4310, or Robert Brooks, Senior Supervisory Financial Analyst, (202) 452-3103, Division of Banking Supervision and Regulation. Board of Governors of the Federal Reserve System, 20th and C Streets, NW., Washington, DC 20551. Telecommunications Device for the Deaf (TDD) users may contact (202-263-4869).

#### **SUPPLEMENTARY INFORMATION:**

##### **I. Background**

Bank holding companies (BHCs) and their subsidiaries engage in certain types of physical commodities activities under a variety of authorities. As explained below, financial holding companies (FHCs) are permitted to engage in a limited amount of physical commodity trading activity that the Board has determined to be complementary to various financial activities in accordance with section 4(k)(1)(B) of the Bank Holding Company Act (BHC Act). In addition, section 4(k)(4)(H) authorizes BHCs to make merchant banking investments in any type of nonfinancial company, including a company engaged in activities involving physical commodities. In the Gramm-Leach-Bliley Act (GLB Act), Congress also authorized several companies to continue to engage in a broad range of physical commodity activities under specific grandfathering authority after these firms became BHCs.<sup>1</sup>

In the past several years, BHCs have expanded their reliance on these authorities to increase their activities involving physical commodity trading and some securities firms that engaged in substantial physical commodity activities were acquired by or became BHCs. During the same period, there have been a variety of events and developments involving physical commodity activities that suggest that the risks of conducting these activities are changing and the steps that firms may take to limit these risks are more limited.

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<sup>1</sup> In addition, national banks owned by BHCs may engage in certain limited types of physical commodity activities under authority granted under the National Bank Act. State-chartered banks also may be authorized to engage in the same activities under state statutes.

In light of these developments and because of the risks associated with various physical commodity activities, the Board has determined to review the scope of the activities that it has authorized under section 4(k)(1)(B) of the BHC Act to ensure that they continue to be consistent with the statutory requirements that the activities be complementary to a financial activity and not pose substantial risks to the safety and soundness of depository institutions or the financial system generally. The Board is also reviewing whether it is appropriate to impose limitations or conditions on the conduct of physical commodity activities by BHCs and their subsidiaries under authority granted under the BHC Act to ensure these activities are conducted in a manner that is consistent with safety and soundness and financial stability.

This advance notice of proposed rulemaking (ANPR) is designed to elicit views from the public on the risks and benefits of allowing FHCs to conduct physical commodity activities under the various provisions of the BHC Act, whether risks to the safety and soundness of a FHC and its affiliated insured depository institutions (IDIs) and to the financial system warrant Board action to impose limitations on the scope of authorized activities and/or the manner in which those activities are conducted, and if so, what those limits should be. Once the Board has completed its review of this information, it will consider what further actions, including a rulemaking, are warranted.

## **II. Complementary Authority**

### **A. Background**

The GLB Act amended the BHC Act to, among other things, allow FHCs to engage in activities, and acquire and retain shares of any company engaged in activities, that the Board determines to be complementary to a financial activity and not to pose a substantial risk to the safety and soundness of depository institutions or the financial system generally (complementary activities).<sup>2</sup> This authority was limited to BHCs that meet the higher capital and other requirements to qualify as a FHC. The purpose of this provision was to allow the Board to permit FHCs to engage in an activity that appears to be commercial rather than financial in nature, but that is meaningfully connected to a financial activity such that it complements the financial activity. In this way, FHCs would not be disadvantaged by market developments if commercial activities evolve into financial activities or nonbank competitors find innovative ways to combine financial and nonfinancial activities.

As part of the finding of complementarity, the Board must find that the activity does not pose a substantial risk to the safety and soundness of depository institutions or the financial system generally. In addition, in connection with any proposal by a FHC to engage in a complementary activity, the Board must consider whether performance of the activity by the FHC may reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such as undue concentration of resources, decreased or unfair

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<sup>2</sup> Gramm-Leach-Bliley Act § 103, 12 U.S.C. § 1843(k)(1)(B).

competition, conflicts of interests, unsound banking practices, or risk to the stability of the United States banking or financial system.<sup>3</sup>

Under this authority, the Board has approved requests by FHCs to engage in three types of complementary activities (1) physical commodity trading involving the purchase and sale of commodities in the spot market, and taking and making delivery of physical commodities to settle commodity derivatives (Physical Commodity Trading); (2) paying power plant owners fixed periodic payments that compensate the owner for its fixed costs in exchange for the right to all or part of the plant's power output (Energy Tolling);<sup>4</sup> and (3) providing transactions and advisory services to power plant owners (Energy Management Services). Together, these three activities are referred to as Complementary Commodities Activities.

*Limits on Physical Commodity Activities.* The Board placed certain restrictions on each Complementary Commodities Activity to protect against the risks the activity posed to the safety and soundness of the FHC, its subsidiary IDI, and the U.S. financial system. For example, consistent with general safety and soundness principles, FHCs are required to limit the aggregate market value of commodities held as a result of Physical Commodity Trading to no more than 5 percent of the FHC's consolidated tier 1 capital.<sup>5</sup> To ensure that Physical Commodity Trading remained complementary to the financial activity of commodity derivatives activities permitted under Regulation Y and to help protect against additional risks associated with dealing in illiquid goods, Physical Commodity Trading also has been limited to physical commodities approved by the Commodity Futures Trading Commission (CFTC) for trading on a U.S. futures exchange (unless specifically excluded by the Board) or commodities the Board otherwise approves.<sup>6</sup>

The Board also determined not to permit FHCs to own, operate, or invest in facilities for the extraction, transportation, storage, or distribution of commodities, or to process, refine, or otherwise alter commodities. In addition, FHCs committed to take steps to address the risks resulting from Physical Commodity Trading activities that

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<sup>3</sup> 12 U.S.C. § 1843(j).

<sup>4</sup> Under Energy Tolling, the toller provides (or pays for) the fuel needed to produce the power that it directs the owner to produce. See, e.g., The Royal Bank of Scotland Group plc, 94 Fed. Res. Bull. C60 (2008) (2008 RBS Order). The agreements also generally provide that the owner will receive a marginal payment for each megawatt hour produced by the plant to cover the owner's variable costs plus a profit margin. Id. The plant owner, however, retains control over the day-to-day operations of the plant and physical plant assets at all times. Id.

<sup>5</sup> See, e.g., 2008 RBS Order; Citigroup Inc., 89 Fed. Res. Bull. 508 (2003) (2003 Citi Order). See also 145 Cong. Rec. H 11529 (daily ed. Nov. 4, 1999) (Statement of Chairman Leach) ("It is expected that complementary activities would not be significant relative to the overall financial activities of the organization.").

<sup>6</sup> See 2003 Citi Order. In limited cases, the Board has permitted FHCs to take and make physical delivery of non-CFTC-approved commodities if the FHC demonstrated that there is a market in financially settled contracts on those commodities, the commodity is fungible, the commodity is liquid, and the FHC has in place trading limits that address concentration risk and overall exposure. See, e.g., 2008 RBS Order.

involve environmentally sensitive products, such as oil or natural gas. These steps have included obtaining insurance and establishing policies and procedures that are intended to prevent and respond to oil spills and similar incidents.<sup>7</sup>

To limit the safety and soundness risks of Energy Tolling, a FHC engaging in Energy Tolling must limit the present value of its future committed capacity payment under an energy tolling agreement to an aggregate of not more than 5 percent of the FHC's consolidated tier 1 capital (after taking account of any investment in commodities held by the FHC under its Physical Commodity Trading authority).<sup>8</sup> Similarly, a FHC must limit the revenues attributable to its Energy Management Services to 5 percent of the FHC's total consolidated operating revenue.<sup>9</sup> The Board has limited the scope of Energy Management Services to ensure FHCs only take risks consistent with the agency nature of such services.<sup>10</sup>

#### B. *Recent Events*

*Environmental catastrophes.* Recent disasters involving physical commodities demonstrate that the risks associated with these activities are unique in type, scope and size. In particular, catastrophes involving environmentally sensitive commodities may cause fatalities and economic damages well in excess of the market value of the commodities involved or the committed capital and insurance policies of market participants.

As an illustration, the oil spill involving the Deepwater Horizon mobile offshore drilling unit caused 11 deaths, numerous personal injuries, and various claims for environmental and economic damages against numerous parties involved in the incident.<sup>11</sup> BP p.l.c. and certain of its subsidiaries have funded the \$20 billion Deepwater Horizon Oil Spill Trust and agreed to pay approximately \$4.5 billion to resolve federal

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<sup>7</sup> In addition, certain FHCs also require that third parties that transport oil for the FHC be a member of a protection and indemnity club, carry the maximum insurance for oil pollution available from the club and have substantial amounts of additional oil pollution insurance from creditworthy insurance companies, use vessels of less than a certain age, use vessels approved by a major international oil company, and use vessels that have appropriate oil spill response plans and equipment. See, e.g., 2003 Citi Order at 510.

<sup>8</sup> See, e.g., 2008 RBS Order.

<sup>9</sup> Fortis S.A./N.V., 94 Fed. Res. Bull. C20 (2008).

<sup>10</sup> Id. Specifically, the Board has required that (1) the owner of the power plant retain the right to market and sell power directly to third parties, which may be subject to the energy manager's right of first refusal; (2) the owner retain the right to determine the level at which the facility will operate (i.e., to dictate the power output of the facility at any given time); (3) neither the energy manager nor its affiliates guarantee the financial performance of the facility; and (4) neither the energy manager nor its affiliates bear any risk of loss if the facility is not profitable. Id.

<sup>11</sup> See, e.g., In re: Oil Spill Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010; Applies to: B1 Mater Complaint, 808 F. Supp. 2d 943 (E.D. La. 2011).

criminal claims and federal securities law claims arising from the incident.<sup>12</sup> BP has recognized cumulative losses of \$42.2 billion as of December 31, 2012, as a result of the incident and has recognized that the incident could continue to have a material adverse impact on BP.<sup>13</sup> Other companies involved in the incident, including the lessor of the Deepwater Horizon drilling unit, a service provider for BP, and minority owners of the well exploration rights and co-lessees of the drilling unit, have incurred billions of dollars in losses.<sup>14</sup> Moreover, litigation involving the disaster is ongoing and the parties are unable to estimate the full impact of the incident on the companies.<sup>15</sup>

Similarly, on September 9, 2010, a natural gas transmission pipeline owned and operated by the Pacific Gas and Electric Company (PG&E) ruptured in San Bruno, California, leading to eight deaths and the destruction or damage of 100 homes.<sup>16</sup> PG&E expects to pay a total of \$565 million for third-party claims for personal injury, property damage, and damage to infrastructure related to the San Bruno incident,<sup>17</sup> has invested approximately \$1 billion in safety activities since the incident, and may be required to pay over \$1 billion in penalties associated with the incident.<sup>18</sup> On February 7, 2010, a natural gas-fueled power plant in Middletown, Connecticut, experienced a catastrophic natural gas explosion that killed six and injured at least 50 people.<sup>19</sup> The Occupational Safety and Health Administration fined 17 companies involved in the incident a total of \$16.6 million<sup>20</sup> and individuals have filed claims for damages in related lawsuits.<sup>21</sup>

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<sup>12</sup> BP, Annual Report and Form 20-F, 59 (Mar. 6, 2013) (BP Annual Report). BP Exploration and Production Inc., a subsidiary of BP, was the lease operator of the Macondo oil well and Deepwater Horizon oil rig. *Id.* at 163.

<sup>13</sup> *Id.* at 38, 61.

<sup>14</sup> Transocean Inc., Form 10-K (Feb 26, 2013) (Transocean Annual Report); Halliburton Company, Form 10-K (Feb. 11, 2013) (Halliburton Annual Report).

<sup>15</sup> BP Annual Report at 173, Transocean Annual Report at 110, Halliburton Annual Report at 17.

<sup>16</sup> Press Release, California Public Utilities Commission, Consumer Protection & Safety Division, September 9, 2010 PG&E Pipeline Rupture in San Bruno, California (Jan. 12, 2012) *available at* <http://www.cpuc.ca.gov/NR/rdonlyres/C71CF8F3-5643-4BC8-8FA3-EA2C81B7A444/0/79PGESB011212.pdf>.

<sup>17</sup> PG&E, Form 8-K (Sept. 6, 2013).

<sup>18</sup> Press Release, California Public Utilities Commission, CPUC Staff Recommend \$2.25 Billion Total Penalty Against PG&E for San Bruno Pipeline Rupture; Penalty would be Largest of its Kind Assessed in Nation (May 6, 2013) *available at* <http://www.cpuc.ca.gov/PUC/sanbrunoreport.htm>.

<sup>19</sup> U.S. Chemical and Safety Hazard Investigation Board, Final Report: Kleen Energy (2010) *available at* <http://www.csb.gov/assets/1/19/KleenUrgentRec.pdf>.

<sup>20</sup> Press Release, OSHA, U.S. Labor Department's OSHA proposes \$16.6 million in fines in connection with fatal Connecticut natural gas explosion (Aug. 5, 2010).

<sup>21</sup> *See, e.g.*, Russ Buettner, \$16.6 Million in Fines After Fatal Blast at a Connecticut Plant, N.Y. Times (Aug. 5, 2010).

Moreover, three similar natural gas explosions at power plants occurred in the United States between 2001 and 2009.<sup>22</sup>

In 2011, the Tohoku earthquake and tsunami caused a severe nuclear incident at the Fukushima Daiichi nuclear power plant that rose to the highest level of severity on the International Nuclear Event Scale.<sup>23</sup> Over 100,000 people were evacuated in response to the incident. In 2013, the operator of the power plant announced that a significant quantity of highly radioactive water had leaked from the reactor, causing the Japanese government to take significant containment measures.<sup>24</sup> More recently, a cargo train carrying crude oil derailed in Lac Mégantic, Quebec, Canada, killing 47 people and causing substantial additional damage. The disaster caused the bankruptcy of the U.S. and Canadian affiliates of the railroad company carrying the oil.<sup>25</sup> Moreover, the Transportation Safety Board of Canada stated that the level of hazard posed by the oil transported was not accurately documented, which was a responsibility of the shipper of the oil under the agency's regulations.<sup>26</sup> The risks of catastrophic events continue, as demonstrated most recently by the collision of a train carrying crude oil with a train carrying grain near an ethanol plant in North Dakota.<sup>27</sup>

Catastrophic events involving commodities also occurred prior to the enactment of the GLB Act, including the oil spill involving the Exxon Valdez (1989), the nuclear incident on Three Mile Island in Pennsylvania (1979), and the incident at the Midway-Sunset Oil Field in California (1910). However, the recent catastrophes accent that the costs of preventing accidents are high and the costs and liability related to physical commodity activities can be difficult to limit and higher than expected.

*Financial Crisis.* The financial crisis demonstrated the effects of market contagion and highlighted the danger of underappreciated tail risks associated with certain activities. Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank Act) to help address risks to financial stability including by requiring the Board to take steps to develop and impose prudential supervisory standards

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<sup>22</sup> Id.

<sup>23</sup> The National Diet of Japan, The Official Report of the Fukushima Nuclear Accident Independent Investigation Commission 12 (2012).

<sup>24</sup> Ministry of Economy, Trade, and Industry, factsheet overview provided to the International Atomic Energy Agency, (Sept. 6, 2013), *available at* <http://www.iaea.org/newscenter/news/2013/fact-sheet.pdf>.

<sup>25</sup> Press Release, Montreal, Maine & Atlantic Corp., Montreal, Maine & Atlantic Files for Bankruptcy in Canada & the U.S. (Aug. 7, 2013), *available at* [http://www.mmarail.com/mma\\_news.php](http://www.mmarail.com/mma_news.php).

<sup>26</sup> Press Release, Transportation Safety Board of Canada, TSB calls on Canadian and U.S. regulators to ensure properties of dangerous goods are accurately determined and documented for safe transportation (Sept. 11, 2013) *available at* <http://www.tsb.gc.ca/eng/medias-media/communiqués/rail/2013/r13d0054-20130911.asp>.

<sup>27</sup> See, e.g., Russell Gold and Lynn Cook, Crude Oil Impurities are Probed in Rail Blasts, Wall St. J. (Jan. 1, 2014) *available at* <http://online.wsj.com/news/articles/SB10001424052702303640604579294794222692778>.

that would mitigate risks posed by large financial firms to the financial system.<sup>28</sup> The Board has taken a number of steps to address these risks. For example, the Board is developing enhanced standards under section 165 of the Dodd-Frank Act “to prevent or mitigate risks to the financial stability of the United States.”<sup>29</sup> The Board also recently adopted a revised capital framework for banking organizations supervised by the Federal Reserve that increases the overall quantity and quality of capital in the banking system.<sup>30</sup>

Currently, 11 of the 12 FHCs that are authorized to engage in one or more Complementary Commodities Activities are also designated as global systemically important banks (G-SIBs), and two G-SIBs conduct commodities activities pursuant to section 4(o) of the BHC Act. The involvement of FHCs in physical commodities activities has substantially increased since 2007, primarily as a result of mergers and acquisitions and securities firms becoming BHCs, adding to the potential that a tail risk event affecting a G-SIB as a result of physical commodity activities could lead to market contagion. Consistent with its actions under the Dodd-Frank Act to address systemic risk, the Board is issuing this ANPR to seek additional information regarding the conduct of physical commodities activities and is considering what additional actions are necessary to mitigate such risk posed by those activities.

### *C. Potential Inadequacies of Current Safeguards and Safety and Soundness Considerations*

While the Board has placed limitations on physical commodities activities that were designed to reduce safety and soundness risks,<sup>31</sup> recent incidents suggest that review of these limits is prudent to determine their adequacy in protecting safety and soundness and financial stability. In addition, ownership of physical commodities that are part of a catastrophic event could suddenly and severely undermine public confidence in the FHC or its insured depository institution and undermine their access to funding markets until the extent of the liability of the FHC can be assessed by the market. Moreover, certain current management techniques designed to mitigate risks, such as frequent monitoring of risk, requirements to restrict the age of transport vessels, and review of disaster plans of third party transporters, may have the unintended effect of increasing the potential that the FHC may become enmeshed in or liable to some degree from a catastrophic event. Accordingly, the Board is reviewing whether the safeguards it has imposed adequately protect against risks to safety and soundness and U.S. financial stability in light of the size and scope of the potential damage associated with a catastrophic event involving a physical commodity. The Board is also reviewing whether to impose additional

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<sup>28</sup> See, e.g., sections 165, 166, 604, and 622 of the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376-2223.

<sup>29</sup> See 77 FR 76628 (Dec. 28, 2012); 77 FR 594 (Jan. 5, 2012).

<sup>30</sup> See 12 CFR part 217.

<sup>31</sup> For example, FHCs may not store, transport, or refine physical commodities, or operate a power plant – and FHCs must use prudent risk management techniques in conducting permissible physical commodity activities – such as separate corporate vehicles, agency agreements, insurance and limitations on the size of investments. See 2003 Citi Order.



prudential safeguards on, or further restrict FHCs' authority to engage in, Complementary Commodities Activities.

*Prohibition on Ownership and Operation.* FHCs may not own, operate, or invest in facilities for the extraction, transportation, storage, or distribution of commodities, or to process, refine, or otherwise alter commodities under complementary authority. However, liability may attach to FHCs that own physical commodities involved in catastrophic events even if the FHCs hire third parties to store and transport the commodities. For example, FHCs engaging in Complementary Commodities Activities may lease and monitor facilities and vessels that hold and transport FHCs' oil. FHCs could face liability under the Oil Pollution Act,<sup>32</sup> Clean Water Act,<sup>33</sup> and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)<sup>34</sup> if their relationship with the third party contractor were deemed to constitute the ownership or operation of transportation or storage facilities under those laws.<sup>35</sup> Moreover, parties not liable as owners or operators under relevant federal law may be held liable under common law,<sup>36</sup> including liability arising from the actions of the third parties hired to store and transport commodities.<sup>37</sup>

*Safety Policies and Procedures.* FHCs have provided commitments to the Board to help ensure environmentally sensitive commodities are safely stored and transported, including age limits on vessels, approval of vessels by a major international oil company, inspection and monitoring of vessels, and backup plans for oil spill responses. As noted, the oil spill involving the Deepwater Horizon drilling unit suggests that current industry safety policies and procedures may not prevent a major environmental disaster and may call into question the effectiveness of such procedures.<sup>38</sup>

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<sup>32</sup> See 33 U.S.C. §§ 2701(32), 2702.

<sup>33</sup> *Id.* at § 1321.

<sup>34</sup> 42 U.S.C. § 9607(a); see also U.S. Env'tl. Prot. Agency, Pub. No. 9345.1-07, Hazard Ranking System Guidance Manual 19 (1992).

<sup>35</sup> See, e.g., Commander Oil Co. v. Barlo Equip. Corp., 215 F.3d 321, 329-32 (2nd Cir. 2000) (discussing instances in which lessees had been and may be found to be "owners" under CERCLA); Phillips 66 Pipeline LLC v. Rogers Cartage Co., No. 11-cv-497-DRH-DGW, 2013 U.S. Dist. LEXIS 11388, at \*19-\*37 (S.D. Ill. 2013) (determining whether a company would be considered an "operator" under CERCLA based on a review of the facts and circumstances, including the defendant company's past acts and business relationships). Owners and operators of such facilities and vessels also may be liable for damages caused from a catastrophic event involving the facility or vessel under maritime and state common law. See, e.g., Exxon Shipping Co. v. Baker, 554 U.S. 471 (2008); Int'l Paper Co. v. Ouellette, 479 U.S. 481 (1987); In re: Oil Spill Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010; Applies to: B1 Mater Complaint, 808 F. Supp. 2d 943 (E.D. La. 2011).

<sup>36</sup> See, e.g., In re: Oil Spill Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010; Applies to: B1 Mater Complaint, 808 F. Supp. 2d 943 (E.D. La. 2011).

<sup>37</sup> Restatement (Second) Torts, ch. 15.

<sup>38</sup> For example, regarding the age limits on vessels, the Deepwater Horizon drilling unit was approximately 10 years old and "was seen as an outstanding rig in Transocean's fleet," a company that is "the world's largest contractor of offshore drilling rigs." National Commission on the Deepwater Horizon Oil Spill and

*Capital and Insurance Requirements.* The capital and insurance that FHCs hold for their Complementary Commodities Activities, and the insurance that FHCs require their oil vessel operators to hold, may not adequately protect FHCs from the degree and types of costs associated with all commodity-related environmental disasters. Liability arising from a catastrophic event associated with physical commodities could well exceed a FHC's liability insurance and capital allocated to the activity.<sup>39</sup> Moreover, certain types of significant costs, such as those associated with clean-up, may be expressly excluded from the insurance policies.<sup>40</sup> In addition, it may be difficult or impossible to determine the extent to which the insurance policies will cover the costs of an environmental disaster before litigation regarding the scope of insurance coverage for the incident is complete.<sup>41</sup>

*Corporate Structure.* FHCs typically conduct Complementary Commodities Activities through nonbanking subsidiaries. However, such a corporate structure may not sufficiently reduce the risk that the parent FHC would be responsible for legal liability arising from the actions of its subsidiary's activities. Although parent corporations generally are not liable for the actions of their subsidiaries, parent companies may incur such liability in a variety of circumstances for a variety of reasons.<sup>42</sup> Considering the diverse set of circumstances under which the corporate veil may be pierced,<sup>43</sup> the Board and FHCs may not be able to accurately predict whether courts would respect the

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Offshore Drilling, Deep Water: The Gulf Oil Disaster and the Future of Offshore Drilling, ch. 1, p. 2 (Jan. 2011) (final report to the President). Regarding the approval of vessels by a major international oil company, the final report of the National Commission on the BP Deepwater Horizon Oil Spill and Offshore Drilling ("Oil Spill Commission") criticized BP's earlier accidents and safety culture. *Id.* at ch. 8. The incident also may call into question the effectiveness of hiring inspectors to monitor the loading and discharging of vessels; the Oil Spill Commission's report also states that two contractors, Transocean and Halliburton, also were extensively involved in the mistakes that caused the well blowout and discussed a general "absence of adequate safety culture in the Offshore U.S. Oil and Gas Industry." *Id.* at ch. 8, p. 224. Moreover, the unsuccessful attempts of expert contractors to remedy and contain the Deepwater Horizon oil spill may bring into question the effectiveness of a FHC's backup response to an environmental disaster. See, e.g., *id.* at ch. 5.

<sup>39</sup> Pollution insurance policies typically have maximum payouts that are well below the amount of damage that an environmental disaster may cause.

<sup>40</sup> See, e.g., Barry R. Ostrager and Thomas R. Newman, Handbook on Insurance Coverage Disputes § 23.03[a] (6th ed. 2012).

<sup>41</sup> Cf. *AES Corp. v. Steadfast Ins. Co.*, 725 S.E.2d 532 (Va. 2012) (holding that an energy company's commercial general liability policy did not cover climate change injuries).

<sup>42</sup> *United States v. Bestfoods*, 524 U.S. 51, 61-63 (1998). The Court has held that the corporate veil also may be pierced in litigation involving violations of federal statutes. *Id.* at 63. See also *United States v. Kayser-Roth Corp.*, 103 F. Supp. 2d 74, 84 (D. RI 2000) ("The doctrine of piercing the corporate veil is one of the most amorphous doctrines in the law because it is multifaceted and serves a variety of purposes that vary from case to case.").

<sup>43</sup> As noted below, courts may consider a variety of factors in determining whether to pierce the corporate veil, including adequate capitalization, separation of assets, and domination of finances, policies and practices. See *infra* fns. 65-68 and corresponding text.

corporate veil between a top-tier FHC and its subsidiary when the subsidiary is liable for extensive damages caused by its Complementary Commodities Activities.

Moreover, several recent events suggest that, even without direct ownership or operational control of an entity that has suffered a catastrophe, the public confidence of a holding company that was engaged in a physical commodity activity with a third party could suddenly and severely be undermined, as could the confidence in the company's subsidiary insured depository institution or their access to funding markets, until the extent of the liability of the holding company could be assessed by the markets. Financial firms, and in particular holding companies of IDIs, are particularly vulnerable to reputational damage to their banking operations. Although the likelihood of a catastrophic event is small in the short term, catastrophes involving physical commodities continue to occur, and the resultant damages are very difficult to measure, even after the event has occurred, and may be extremely large.<sup>44</sup> The fact that a FHC has not been involved in such an event to date does not reduce the probability that such an event may occur or that the event could have a material adverse impact on the financial condition of the FHC. In fact, the absence of such an experience may hinder FHCs' ability to assess the efficacy of their safeguards.

To help the Board assess the risks of physical commodities activities and the adequacy of the safeguards and limitations already in place, the Board invites public comment on those activities, risks and limitations. In particular, the Board invites comment on the following questions:

Question 1. *What criteria should the Board look to when determining whether a physical commodity poses an undue risk to the safety and soundness of a FHC?*

Question 2. *What additional conditions, if any, should the Board impose on Complementary Commodities Activities? For example, are the risks of these activities adequately addressed by imposing one or more of the following requirements: (i) enhanced capital requirements for Complementary Commodities Activities, (ii) increased insurance requirements for Complementary Commodities Activities, and (iii) reductions in the amount of assets and revenue attributable to Complementary Commodities Activities, including absolute dollar limits and caps based on a percentage of the FHC's regulatory capital or revenue?*

Question 3. *What additional conditions on Complementary Commodities Activities should the Board impose to provide meaningful protections against the legal, reputational and environmental risks associated with physical commodities and how effective would such conditions be?*

Question 4. *To what extent does the commitment that a FHC will only hold physical commodities for which a futures contract has been approved by the CFTC or for which the Board has specifically authorized the FHC to hold adequately ensure that*

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<sup>44</sup> See *supra* fns. 13-15 and corresponding text (discussing inability of companies involved in the BP oil spill to measure the full extent of legal liability).

*physical commodities positions of FHCs are sufficiently liquid? What modifications to this commitment, including additional conditions, should the Board consider to ensure that a FHC maintains adequate liquidity in its commodity positions?*

*Question 5. What additional commitments or restrictions are necessary to ensure FHCs engaging in Complementary Commodities Activities do not develop unsafe or unsound concentrations in physical commodities?*

*Question 6. Should the type and scope of limitations on Complementary Commodities Activities differ based on whether the underlying physical commodity may be associated with catastrophic risks? If so, how should limitations differ, and what specific limitations could reduce liability from potential catastrophic events?*

*Question 7. Does the commitment not to own, operate or invest in facilities for the extraction, transportation, storage, or distribution of commodities adequately insulate a FHC from risks associated with such facilities, including financial risk, storage risk, transportation risk, reputation risk, and legal and environmental risks? If not, what restrictions should the Board impose to ensure that such extraction, transportation, storage or distribution facilities do not pose safety and soundness risks?*

*Question 8. Do Complementary Commodities Activities pose risks or raise concerns other than those described in this ANPR, and if so, how should those risks or concerns be addressed?*

*Question 9. What negative effects, if any, would a FHC's subsidiary depository institution experience if the parent FHC was not able to engage in Complementary Commodities Activities?*

*Question 10. How effective is the current value-at-risk capital framework in addressing the risk arising from holdings of physical commodities? Would additional or different capital requirements better address the potential risks associated with Complementary Commodities Activities?*

*Question 11. What are the similarities and differences between the risks posed to FHCs by physical commodities activities, as described in this ANPR, and the risks posed to nonbank financial companies supervised by the Board ("nonbank SIFIs")? How do the safety and soundness and financial stability risks posed by physical commodities activities differ, if at all, based on whether the nonbank SIFI controls an IDI?*

*Question 12. What are the similarities and differences between the risks posed to FHCs by physical commodities activities, as described in the ANPR, and the risks posed to savings and loan holding companies that may conduct such activities? How do the safety and soundness and financial stability risks posed by physical commodities activities differ, if at all, based on whether the savings and loan holding company is or is not affiliated with an insurance company?*

#### D. Complementarity of Current Activities

It has been ten years since the Board first determined that physical commodities activities were complementary to financial activities for purposes of section 4(k)(1)(B) of the BHC Act. Since that time, the Board has received notices from fewer than 20 FHCs seeking authority to conduct one or more Complementary Commodities Activities. Two of the 12 FHCs that currently conduct physical commodities activities under complementary authority recently have publicly reported that they intend to cease such activities while continuing to engage in related financial activities, including commodities derivatives activities.<sup>45</sup> Another FHC that conducts physical commodities activities pursuant to section 4(o) of the BHC Act, which is a separate statutory authority discussed below,<sup>46</sup> has recently agreed to sell the global oil merchanting unit of its commodities division to a foreign oil and gas company and is in the process of selling other physical commodities units.<sup>47</sup>

Although market developments such as these may be caused by a variety of factors, the developments may indicate that Complementary Commodities Activities are not necessary to ensure competitive equity between FHCs and competitors conducting commodities derivatives or other financial activities. Moreover, these developments, including a FHC's sale of a physical commodities business to a nonfinancial firm, may suggest that the relationship between commodities derivatives and physical commodities markets (or the relationship between participants in such markets) may not be as close as previously claimed or expected. Because complementary activities should be "meaningfully connected" to a financial activity such that it "complements" the financial activity, the Board is reexamining whether each Complementary Commodities Activity can continue to fulfill this statutory requirement.<sup>48</sup> The Board is also evaluating the potential costs and other burdens (to FHCs and the public generally) associated with narrowing or eliminating the authority to engage in Complementary Commodities Activities.

Question 13. *In what ways are non-BHC participants in the physical commodities markets combining financial and nonfinancial products or services in such markets?*

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<sup>45</sup> Press Release, Deutsche Bank refocuses its commodities business (Dec. 5, 2103) *available at* [https://www.db.com/ir/en/content/ir\\_releases\\_2013\\_4413.htm](https://www.db.com/ir/en/content/ir_releases_2013_4413.htm); Press Release, JPMorgan Chase & Co., J.P. Morgan to Explore Strategic Alternatives for its Physical Commodities Business (July 26, 2013) *available at* <http://investor.shareholder.com/jpmorganchase/releasedetail.cfm?ReleaseID=780681>.

<sup>46</sup> See infra section IV (discussing section 4(o) of the BHC Act).

<sup>47</sup> Press Release, Morgan Stanley, Morgan Stanley to Sell Global Oil Merchanting Business to Rosneft (Dec. 20, 2013) *available at* <http://www.morganstanley.com/about/press/articles/00ddb583-1c3c-4dd9-b27f-6023c884aae3.html>.

<sup>48</sup> See, e.g., 2003 Citi Order.

Question 14. *What are the complementarities or synergies between Complementary Commodities Activities and the financial activities of FHCs? How have these complementarities or synergies changed over time?*

Question 15. *What are the competitive effects on commodities markets of FHC engagement in Complementary Commodities Activities?*

Question 16. *Does permitting FHCs to engage in Complementary Commodities Activities create material conflicts of interest that are not addressed by existing law? If so, describe such material conflicts and how they may be addressed.*

Question 17. *What are the potential adverse effects and public benefits of FHCs engaging in Complementary Commodities Activities? Do the potential adverse effects of FHCs engaging in Complementary Commodities Activities, such as undue concentration of resources, decreased or unfair competition, conflicts of interest, unsound banking practices, or risk to the stability of the United States banking or financial system, outweigh the public benefits, such as greater convenience, increased competition, or gains in efficiency?*

Question 18. *In what ways would FHCs be disadvantaged if they did not have authority to engage in Complementary Commodities Activities? How might elimination of the authority affect FHC customers and the relevant markets?*

### **III. Merchant Banking Authority**

#### *A. Background*

The GLB Act amended the BHC Act to allow FHCs to engage in merchant banking activities. Under section 4(k)(4)(H) of the BHC Act, FHCs may make investments in nonfinancial companies as part of a bona fide securities underwriting or merchant or investment banking activity.<sup>49</sup> These investments may be made in any type of ownership interest in any type of nonfinancial entity (portfolio company).<sup>50</sup> The statute grants similar authority to insurance companies that are FHCs or subsidiaries of FHCs.<sup>51</sup>

The GLB Act imposed conditions on the merchant banking investments of FHCs that further the fundamental purposes of the BHC Act – to help maintain the separation of banking and commerce and promote safety and soundness.<sup>52</sup> First, the investment must be part of “a bona fide underwriting or merchant or investment banking activity” and may not be held by an IDI or its subsidiary.<sup>53</sup> Second, FHCs making merchant banking

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<sup>49</sup> 12 U.S.C. § 1843(k)(4)(H).

<sup>50</sup> Id.

<sup>51</sup> Id. at § 1843(k)(4)(I).

<sup>52</sup> See 66 FR 8466 (Jan. 31, 2001).

<sup>53</sup> 12 U.S.C. § 1843(k)(4)(H)(i).

investments must own or control a securities affiliate or a registered investment adviser that advises an affiliated insurance company.<sup>54</sup> Third, merchant banking investments must be held only “for a period of time to enable the sale or disposition thereof on a reasonable basis consistent with the financial viability of the activities.”<sup>55</sup> Regulation Y interprets the statutory holding period restriction to prohibit FHCs in most cases from holding investments made under merchant banking authority for more than 10 years (or for more than 15 years for investments held under a qualifying private equity fund).<sup>56</sup>

Finally, FHCs may not “routinely manage or operate such company or entity except as may be necessary or required to obtain a reasonable return on investment upon resale or disposition.”<sup>57</sup> The Board’s Regulation Y limits the duration of management activities to a period “as may be necessary to address the cause of the [FHC]’s involvement, to obtain suitable alternative management arrangements, to dispose of the investment, or to otherwise obtain a reasonable return upon the resale or disposition of the investment and imposes documentation requirements on these extraordinary management activities.”<sup>58</sup>

The Board’s rules state that routine management includes executive officer interlocks between the FHC and portfolio company and contractual arrangements that restrict the portfolio company’s ability to make routine business decisions.<sup>59</sup> Regulation Y also makes clear that certain relationships with the portfolio company are not considered routine management: director representation at the portfolio company and contractual restrictions related to portfolio company actions taken outside the ordinary course are not deemed to be routine management.<sup>60</sup> FHCs also may meet with officers or employees of the portfolio company to monitor and provide advice with respect to the portfolio company’s performance and activities and to provide financial, investment, and management consulting services to the portfolio company.<sup>61</sup>

The Board’s rules impose certain prudential requirements on FHCs’ merchant banking activities to encourage them to be done in a safe and sound manner. Regulation Y requires the FHC to establish risk management policies and procedures for its merchant banking activities, including policies and procedures designed to ensure the maintenance of corporate separateness between the FHC and its companies held under merchant banking authority and to protect the FHC and its subsidiary IDIs from legal liability from the operations and financial obligations of its portfolio companies and

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<sup>54</sup> Id. at § 1843(k)(4)(H)(ii).

<sup>55</sup> Id. at § 1843(k)(4)(H)(iii).

<sup>56</sup> 12 CFR 225.172-.173.

<sup>57</sup> 12 U.S.C. § 1843(k)(4)(H)(iv).

<sup>58</sup> 12 CFR 225.171(e).

<sup>59</sup> Id. at 225.171(b).

<sup>60</sup> Id. at 225.171(d).

<sup>61</sup> Id.

private equity funds.<sup>62</sup> In addition, the Board's capital adequacy guidelines currently require that a FHC deduct its merchant banking and other nonfinancial investments from its tier 1 capital.<sup>63</sup> The Board's revised capital framework (Regulation Q) eliminates this specific deduction for nonfinancial investments; merchant banking investments instead is addressed through risk-weighting in the equity framework.<sup>64</sup>

#### *B. Tail-Risks of Merchant Banking Investments*

The doctrine of corporate separateness and limited liability is an important premise for the safe and sound conduct of merchant banking activities. The corporate law doctrine of veil piercing allows parent companies to be legally liable for the operations of their subsidiaries in a variety of circumstances. For example, courts may pierce the corporate veil when the subsidiary corporation is not treated as an independent entity.<sup>65</sup> Factors courts consider under this analysis include whether the subsidiary is adequately capitalized, holds separate director and shareholder meetings, or keeps assets separate.<sup>66</sup> Courts also have pierced the corporate veil where the parent dominated the finances, policies, and practices of the subsidiary so that the company is used as a mere agency or instrumentality of the parent.<sup>67</sup> Veil piercing also has been used to prevent fraud or other inequitable results.<sup>68</sup>

As discussed previously, certain physical commodities activities may cause catastrophic events that could subject the involved companies to substantial legal, environmental, and reputational risk. Other commercial activities may pose the same or similar types of risks in amounts that greatly exceed the company's equity. For example, owners or operators of factories that use substances that are hazardous to public health or the environment face significant legal, operational, and reputational risk.

Merchant banking investments also pose a number of other risks to FHCs, including market, credit, and concentration risks. FHCs are required to identify and manage such risks. However, recent events (including the financial crisis) demonstrate that low probability events can pose a danger to large organizations as well as to the financial stability of the United States. Accordingly, the Board is reconsidering whether

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<sup>62</sup> *Id.* at 225.175(b).

<sup>63</sup> 12 CFR part 225, Appendix A. The Board previously limited FHCs' merchant banking investments to 30 percent of its tier 1 capital (or 20 percent after excluding interests in private equity funds). 12 CFR 225.174.

<sup>64</sup> 12 CFR 217.52-.53 and 217.153-.154.

<sup>65</sup> See, e.g., *United States v. Northeastern Pharm. & Chem. Co.*, 810 F.2d 726, 744 (8th Cir. 1987).

<sup>66</sup> See, e.g., *United States v. Kayser-Roth Corp.*, 103 F. Supp. 2d 74, 84 (D.C. R.I. 2000) (citing 1 William Meade Fletcher et al., *Fletcher Cyclopedia of the Law of Private Corporations* § 41.30 (perm .ed. rev. vol. 1999)).

<sup>67</sup> See, e.g., *United States v. Bestfoods*, 524 U.S. 51, 62 (1998); *Miller v. Dixon Indus. Corp.*, 513 A.2d 597, 604 (R.I. 1986).

<sup>68</sup> See, e.g., *R&B Elec. Co. AMCO Constr. Co.*, 471 A.2d 1351, 1354 (R.I. 1984).



its current merchant banking regulations appropriately address the concerns described above.

### *C. Potential Board Actions Regarding Merchant Banking Investments*

The Board is considering a number of actions to address the potential risks associated with merchant banking investments. These actions could include (i) more restrictive merchant banking investment holding periods; (ii) additional restrictions on the routine management of merchant banking investments; (iii) additional capital requirements on some or all merchant banking investments; and (iv) enhanced reporting to the Federal Reserve or public disclosures regarding merchant banking investments.

*Question 19. Should the Board's merchant banking rules regarding holding periods, routine management, or prudential requirements be more restrictive for investments in portfolio companies that pose significantly greater risks to the safety and soundness of the investing FHC or its subsidiary depository institution(s)? How could the Board evaluate the types and degrees of risks posed by individual portfolio companies or commercial industries?*

*Question 20. Do the Board's current routine management restrictions and risk management requirements sufficiently protect against a court piercing the corporate veil of a FHC's portfolio company? If not, what additional restrictions or requirements would better ensure against successful veil piercing actions?*

*Question 21. What are the advantages and disadvantages of the Board raising capital requirements on merchant banking investments or placing limits on the total amount of merchant banking investments made by a FHC? How should the Board formulate any such capital requirements or limits?*

*Question 22. What are the similarities and differences between the risks described above regarding merchant banking investments and the risks regarding investments made under section 4(k)(4)(I) of the BHC Act, which allows insurance companies to make controlling investments in nonfinancial companies (subject to certain restrictions)?*

## **IV. Section 4(o) Grandfather Authority**

Certain BHCs may engage in a broad range of activities involving physical commodities pursuant to other provisions of the BHC Act. Under section 4(o) of the BHC Act, a company that was not a BHC and becomes a FHC after November 12, 1999, may continue to engage in activities related to the trading, sale, or investment in commodities that were not permissible for BHCs as of September 30, 1997, if the company was engaged in the United States in such activities as of September 30, 1997.<sup>69</sup> This statutory provision limits these grandfathered activities to no more than 5 percent of the FHC's total consolidated assets and prohibits the FHC from cross-marketing the

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<sup>69</sup> 12 U.S.C. § 1843(o).

services of its subsidiary depository institution(s) and its subsidiary(ies) engaged in activities authorized under section 4(o).<sup>70</sup> In contrast to complementary authority, this authority is automatic; no approval by or notice to the Board is required for a company to rely on this authority for its commodity activities. Only two FHCs currently engage in activities under these grandfather rights.

The statutory grandfathering authority in section 4(o) of the BHC Act permits certain BHCs to engage in a potentially broader set of physical commodity activities than FHCs may conduct under the complementary authority discussed above, and without the limitations on duration and control contained in merchant banking authority. At the same time, grandfathered physical commodity activities may pose risks to safety and soundness of the grandfathered FHCs and to financial stability. As a result, the Board is seeking comment on whether additional prudential requirements could help ensure that activities conducted under section 4(o) of the BHC Act do not pose undue risks to the safety and soundness of the BHC or its subsidiary depository institutions, or to financial stability. The Board is also considering how to address the potential risks to safety and soundness and financial stability that may be presented by activities authorized under section 4(o). In addition to comment on these general questions, the Board invites comments on the following:

Question 23. *What are the advantages and disadvantages of the Board instituting additional safety and soundness, capital, liquidity, reporting, or disclosure requirements for BHCs engaging in activities or investments under section 4(o) of the BHC Act? How should the Board formulate such requirements?*

Question 24. *Does section 4(o) of the BHC Act create competitive equity or other issues or authorize activities that cannot be conducted in a safe and sound manner by an FHC? If so, describe such issues or activities.*

## **V. Conclusion**

The Board is seeking information on all aspects of physical commodities activities of BHCs and banks and invites comments on the risks and benefits of allowing FHCs to conduct these activities as well as ways in which risks to the safety and soundness of a FHC and its affiliated IDIs and to the financial system can be contained or limited. In addition, the Board invites comment on all of the questions set forth in this ANPR. The Board will carefully review all comments submitted and information provided as well as information regarding physical commodities activities derived from the Board's regulatory and supervisory activities. Once the Board has completed its review of this information, it will consider what further actions, including a rulemaking, regarding these activities are needed.

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<sup>70</sup> This limit permits these FHCs to hold significantly larger positions in commodities than those FHCs that conduct commodities activity under complementary authority, which limits their commodities holdings to 5 percent of tier 1 capital.

By order of the Board of Governors of the Federal Reserve System, January 14, 2014.

*Robert deV. Frierson (signed)*

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Robert deV. Frierson,  
Secretary of the Board.